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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH BLACKNELL III, Defendant and Appellant.	A156923 (Contra Costa County Super. Ct. No. 05-110816-6)

In prior opinions in this case, we affirmed defendant's convictions on 16 counts of criminal conduct arising from a killing in March 2009 and a crime spree six months later, in September 2009.[1] In our second opinion, following remand from the Supreme Court to consider the admissibility of a gang expert's testimony in light of *People v. Sanchez* (2016) 63 Cal.4th 665, we reaffirmed defendant's convictions, but remanded the case to the trial court to exercise its newly conferred discretion under Penal Code section 12022.53[2] to consider striking multiple firearm enhancements. After a hearing at which defendant was present and represented by counsel, the court declined to strike any of the enhancements.

In the instant appeal, defendant claims the trial court abused its discretion in refusing to strike the enhancements. He additionally claims his life sentence without

[1] *People v. Blacknell* (Oct. 20, 2015, A135721) [nonpub. opn.] (*Blacknell I*); *People v. Blacknell* (April 23, 2018, A135721) [nonpub. opn.] (*Blacknell II*).

[2] All statutory references are to the Penal Code unless otherwise indicated.

parole (LWOP) (imposed for the murder) and his consecutive life and determinate sentences (imposed for his other crimes) constitute, collectively, cruel and unusual punishment under the federal and state constitutions, given that he was 18 years old at the time of the offenses. He also claims the trial court erred in its calculation of his total determinate sentence.

We conclude the trial court did not abuse its discretion under section 12022.53 and reject defendant's constitutional challenges to his sentence. We agree, however, the abstract of judgment should be corrected to specify a total determinate term of 47 years and eight months.

DISCUSSION

Refusal to Strike Firearm Enhancements

After defendant was convicted, the trial court imposed then-mandatory firearm use enhancements as to seven of the counts. Section 12022.53 was subsequently amended, effective January 1, 2018, to give trial courts discretion, "in the interest of justice pursuant to Section 1385," to "strike or dismiss an enhancement otherwise required to be imposed." (§ 12022.53, subd. (h).)

Accordingly, in our second opinion, we reversed the firearm enhancements and remanded to allow the trial court to exercise its new discretion in this regard. After considering additional submissions by defendant and hearing argument by defense counsel, the court declined to strike any of the enhancements.[3]

In *People v. Pearson* (2019) 38 Cal.App.5th 112, 115–116 (*Pearson*), the Court of Appeal recently set forth the fundamentals governing review of a trial court's decision not to strike a firearm enhancement under section 12022.53. As the court explained, "[u]nder 'section 12022.53, subdivision (d), a defendant convicted of a qualifying felony who intentionally and personally discharges a firearm, proximately causing great bodily

[3] As the trial court observed, the enhancements did not impact the LWOP sentence imposed for the murder. Rather, they affected the life and determinate sentences imposed for the additional crimes of which defendant was convicted.

injury or death, is subject to an additional term of 25 years to life.' (*People v. Garcia* (2002) 28 Cal.4th 1166, 1169 . . . .) . . . [¶] Senate Bill No. 620 [(2017–2018 Reg. Sess.)], which added section 12022.53, subdivision (h), gave the trial court discretion 'in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section.' (§ 12022.53, subd. (h).) [¶] ' "[A] court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is" reviewable for abuse of discretion.' (*People v. Carmony* (2004) 33 Cal.4th 367, 373. . . .) 'In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, " '[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' " [Citation.] Second, a " 'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." ' " [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' (*Id*. at pp. 376–377.)" (*Pearson*, at pp. 115–116.)

Here, the trial court reviewed all the materials defendant submitted in support of his request that it strike the firearm enhancements. In fact, the court took a recess during the hearing to ensure it was thoroughly conversant with these materials.

On reconvening, the court explained that it was familiar with the kind of social worker reports defendant had submitted, having sat in the juvenile court for over four years, and that none of the materials changed the court's view as to the propriety of the sentence it had imposed:

> "I've reviewed all of these [documents], and I can say . . . [¶] . . . [¶] Well, I'm satisfied there's nothing in there that changes my opinion as was reflected by the Court of Appeal in their, I guess, the 35th page that they cited some of the things I said at the sentencing with regard to the extreme violent and vicious nature of the conduct from Mr. Blacknell in committing

> the crimes for which he received convictions. There is nothing at all in the package [from defendant] that would cause me to exercise any discretion to reduce any of the charges or the enhancements including—it doesn't even begin to address anything sufficient for me to think about reducing the LWOP if it was unconstitutional. [¶]
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> ". . . I do feel comfortable that I made the right sentence at the time. . . . [¶] . . . [¶]
>
> "I have, in making my decision not to exercise discretion to strike the 12022.53 enhancements, for purposes of argument, I assume everything in these documents [submitted by defendant] is true. And having done dependency for as long as I did, many of the statements taken by the social worker are statements from other people. And there's always some credibility issues which can go both ways. Sometimes people will claim everything is just fine, and it's not. And other times people claim things are terrible, and it's not. But for purposes of my discretion analysis, I assumed everything was true in the documents attached."

In short, the trial court gave defendant every benefit of the doubt in its consideration of the materials he provided. None of the materials, however, altered the court's view that the defendant had engaged in vicious and wanton criminal conduct, warranting imposition of the firearm enhancements. As we set forth in detail in our prior opinions, the court's view of defendant's conduct is amply supported by the record and nature of the crimes of which he was convicted.

Defendant suggests the "spirit" of the legislation conferring discretion to strike enhancements is weighted in favor of defendants—because a committee report includes a comment attributed to the author of the legislation that enhancements should sometimes be stricken because long sentences are costly to the state, do not deter crime, " '[g]reatly increase[] the population of incarcerated persons [and] [d]isproportionately increase[] racial disparities in imprisonment[].' " (See Sen. Com. on Public Safety, Sen. Bill No. 620 (2017–2018 Reg. Sess.) March 28, 2017, p. 3.)

The statute, however, contains no language suggesting the discretion accorded to the trial courts is fettered in any way, or that it is to be presumed the courts will exercise their discretion in favor of a defendant absent exceptional circumstances. And as the

Attorney General points out, the reported author's comment concludes with language refuting any suggestion the discretion conferred by the statute differs from that accorded to the trial courts in other sentencing matters: "SB 620 would allow a court [to] use judicial discretion when applying a sentence enhancement when a person uses or discharges a firearm when a person is convicted for committing a felony. This is consistent with other enhancement sentence laws and retains existing sanctions for serious crimes." (Sen. Com. on Public Safety, Sen. Bill No. 620 (2017–2018 Reg. Sess.) March 28, 2017, p. 3.)

Given the seriousness of the criminal conduct for which defendant was convicted, we have no doubt the trial court was acting well within the "spirit," as well as the letter, of the recent amendments to section 12022.53. And we certainly cannot say, on this record, that in declining to strike the firearm enhancements, the trial court reached a " 'decision [] so irrational or arbitrary that no reasonable person could agree with it.' "[4] (*Pearson*, *supra*, 38 Cal.App.5th at p. 116.)

Constitutional Challenges to Sentence

In our first opinion, we rejected defendant's federal and state constitutional challenges to his sentence (*Blacknell I*, *supra*, A135721), and the Attorney General maintains defendant cannot advance these same claims a second time. Defendant insists he is not barred from pursuing these constitutional claims because the trial court had the ability on remand to revisit his entire sentence and he presented additional evidence for the court to consider.

We need not, and do not, decide whether the law of the case doctrine could be applied to curtail defendant's constitutional challenges. Even assuming defendant is not

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[4] Defendant also claims the trial court's refusal to strike the enhancements resulted in a "cruel and unusual" sentence, because the enhancements, alone, added "44 years, eight months, plus 75 to life" to the sentence. The Attorney General more specifically explains: "the trial court added 24 years 8 months to the determinate portion of the sentence" on counts 8, 17 and 19; "20 years to the life sentence on count 13; and 25 years to life each on counts 2, 10 and 12." We address defendant's renewed constitutional challenges to his sentence in the next section of this opinion.

so hampered, we reach the same conclusion—that defendant's lengthy sentence is not unconstitutional.

Defendant again invites us to hold that although he was over the age of 18 when he committed the offenses, he can advance a federal constitutional challenge under *Miller v. Alabama* (2012) 567 U.S. 460 and *Graham v. Florida* (2010) 560 U.S. 48. We again decline to do so for the reasons set forth in *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482. (See *People v. Edwards* (2019) 34 Cal.App.5th 183, 190–192 (*Edwards*); *People v. Perez* (2016) 3 Cal.App.5th 612, 617; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220 (*Abundio*).)

We likewise reject defendant's renewed state constitutional claim that his sentence is excessive under *People v. Dillon* (1983) 34 Cal.3d 441 (abrogated by statute on another ground as stated in *People v. Chun* (2009) 45 Cal.4th 1172, 1186). The circumstances here are not similar to the "unique" circumstances of the 17 year old convicted of felony murder in *Dillon.* (*Abundio, supra,* 221 Cal.App.4th at pp. 1218–1221 [*Dillon* involved " 'an unusually immature youth' " with no criminal history and whose immaturity prevented him from either foreseeing the risk he was creating or extricating himself without panicking]; *Id*., at p. 1213 [LWOP plus one year sentence imposed in *Abundio* on 18 year old defendant for first degree murder and enhancements was not unconstitutionally excessive]; see *Edwards, supra,* 34 Cal.App.5th at pp. 190–192 [sentences of 129 years imposed on one 19 year old defendant, and 95 years imposed on another, for armed robbery and sexual offenses was not unconstitutionally excessive]; *People v. Garcia* (2017) 7 Cal.App.5th 941, 952–954 [sentence of 32 years to life imposed on 15 year old defendant for attempted murder and other charges for robbing and shooting a woman in the face was not unconstitutionally excessive].)

Enhancements on Counts 5 and 15

Defendant also contends the trial court erred in running enhancements on count 5 and count 15 consecutively, rather than concurrently. The Attorney General acknowledges there is an error in the abstract of judgment as to count 5, which can be

corrected. He disputes there is any error as to count 15. We agree with the Attorney General.

On count 5 (auto theft), the trial court pronounced sentence of the midterm of two years, plus a midterm criminal street gang enhancement of three years, "for a total of 5 years, that sentence will run concurrent to the princip[al] term in Count Eight." The abstract of judgment indicates the base term for count 5 is concurrent, but fails to indicate the enhancement is also concurrent and, instead, adds three years to the total determinate term.

As the Attorney General acknowledges, when the base sentences for offenses are concurrent, it is error to impose consecutive enhancements. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1016.) As the Attorney General further points out, the trial court's oral pronouncement prevails, and the record makes clear that the court properly pronounced sentence. (*People v. Mesa* (1975) 14 Cal.3d 466, 471, abrogated by statute on another ground as stated in *People v. Turner* (1998) 67 Cal.4th 1258, 1267.) We therefore agree the error in the abstract can be rectified, and we shall order the abstract corrected to reflect that the enhancement on count 5 is concurrent and that the total determinate sentence is 47 years eight months. (See *People v. Ngaue* (1992) 8 Cal.App.4th 896, 907.)

On count 15 (carjacking), the trial court pronounced a principal term of 15 years to life, plus 10 years for the firearm enhancement, for a total of "25-years-to-life, however that will be concurrent with Count Two, not consecutive. It's concurrent." The abstract of judgment correctly shows a concurrent principal term of 15 years to life plus an enhancement, for a total term of 25 years to life on that count. Accordingly, the trial court correctly pronounced sentence, and the abstract of judgment correctly reflects that sentence.[5]

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[5] Defendant also maintains the abstract incorrectly shows a section 12022.53, subdivision (c) enhancement, rather than a section 12022.5, subdivision (b) enhancement. However, the abstract is correct in this regard, as the court orally imposed a subdivision (c) enhancement in connection with count 15.

15 Years to Life Terms on Counts 10 and 11

The trial court imposed principal terms of 15 years to life on counts 10 (shooting at an occupied vehicle) and 11 (carjacking). Defendant claims that under section 186.22, subdivision (b)(4)(B), the court's terminology ought to have been "life with the possibility of parole and a minimum parole eligibility term of 15 years."[6] The Attorney General maintains the court's terminology was perfectly appropriate.

Defendant cites principally to *People v. Jefferson* (1999) 21 Cal.4th 86 (*Jefferson*), and *People v. Ramos* (2004) 121 Cal.App.4th 1194 (*Ramos*). Neither case indicates the trial court erred in its phraseology. In fact, in *Jefferson,* the Supreme Court concluded that the "minimum term" of an indeterminate sentence required under the Three Strikes Law was supplied by another statute, section 3046, which specified in pertinent part that " '[n]o prisoner imprisoned under a life sentence may be paroled until he or she has served at least seven calendar years or has served a term as established pursuant to any other section of law that establishes a minimum period of confinement under a life sentence before eligibility for parole, whichever is greater.' " (*Jefferson,* at p. 93, quoting § 3046.) "A statute requiring a prisoner to serve a specified term of incarceration before being released on parole is," explained the high court, "a provision requiring service of a 'minimum term' within the . . . language of [the Three Strikes Law]." (*Jefferson,* at p. 96.) The court went on to explain that the criminal street gang sentencing requirements under section 186.22, subdivision (b)(4) do not preclude the applicability of the Three Strikes Law. The "15-year minimum term prescribed by section 186.22(b)(4)," said the court, "is not [an] enhancement." (*Jefferson*, at p. 101.) "Unlike an

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[6] Section 186.22, subdivision (b)(4)(B) provides in relevant part that any person convicted of designated felonies with the specific intent to promote a street gang

> "[S]hall . . . be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] . . . [¶]
>
> (B) Imprisonment in the state prison for 15 years, if the felony is a . . . carjacking, as defined in Section 215; [or] a felony violation of Section 246 . . . ."

enhancement, which provides for an *additional term* of imprisonment, the 15-year minimum term in section 186.22(b)(4) sets forth an *alternate* penalty for the underlying felony itself . . . ." (*Id.* at p. 101.) Accordingly, the doubling provisions of the Three Strikes Law can be applied, resulting, for example, in a 30-year minimum term. (*Id.* at pp. 101–102.) *Ramos, supra*, 121 Cal.App.4th at p. 1209, which defendant also cites is not to the contrary. It cursorily dealt with a smattering of sentencing issues, including that the trial court had erred in adding an "enhancement" under section 186.22, subdivision (b)(5). The court stated that that subdivision "requires service of a 15–year term before parole eligibility, not a 15–year enhancement." (*Ibid*.) The court was not called on to consider, nor did it, whether phrasing the sentence as "15 years to life" would be improper.

We therefore conclude the trial court did not err in imposing a life sentence with a "15-year minimum term prescribed by section 186.22(b)(4)" (*Jefferson, supra*, 21 Cal.4th at p. 101), stated as "15 years to life." (See *People v. Leon* (2016) 243 Cal.App.4th 1003, 1022 [stating defendants "received consecutive sentences of 15 years to life for their gang-related robbery convictions"]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228 [stating trial court correctly "imposed a 15–year–to–life sentence, for the gang enhancement allegation under section 186.22, subdivision (b)"].)

Error in Total Determinate Term

As we have discussed, the abstract of judgment must be corrected to comport with the trial court's pronouncement of sentence on count 5 (auto theft)—specifically to reflect that the three-year street gang enhancement on count 5 runs concurrently with the sentence on count 8. With this correction, the total determinate sentence as reflected in the abstract will be 47 years eight months.

Although defendant does not take issue with total determinate term that will be shown on the *corrected* abstract of judgment—47 years eight months—he nevertheless claims the trial court "added a new term of three years for an unspecified prior error for unspecified reasons, apparently outside the presence of Blacknell and defense counsel." He points to a note on the clerk's minutes, stating as follows:

> "*Unreported:* Upon re-calculating the total determinate sentence on the 3rd Amended Abstract of Judgment, the total amount comes to 50 years and 8 months. Please note that the previous determinate Abstract of Judgment filed on June 12, 2012 indicated a total of 49 years and 8 months, which was miscalculated and should've reflected a total of 52 years and 8 months."

Defendant claims this reflects an unconstitutional pronouncement of sentencing without his presence.

As the Attorney General points out, the record affirmatively shows that defendant and his attorney were present at the hearing on remand for which these minutes were prepared.

There is also no evidence that the "unreported" note reflects that the trial court imposed "an additional three-year term." Rather, the only reasonable conclusion that can be drawn from the entirety of the sentencing record is that the trial court was trying to explain both an error it believed it had previously made and the effect of this Court's later reversal of several counts.

After initially pronouncing sentence, the trial court recalled the matter, stating it had made "a couple of minor errors" and was therefore going to again recite its sentence. The court then proceeded, by count, to repronounce sentence, concluding that the total determinate sentence was "49 years and 8 months which will be served first."

During the sentencing hearing on remand, the trial court pointed out "the convictions on Count Three, Fourteen, Twenty-one, and Twenty-two are reversed, and the sentences on those four counts are vacated." Since the sentences on the first three of these counts had been stayed, their reversal did not affect the total determinate term. But the reversal as to count 22 reduced the term to 47 years eight months—the correct total determinate term, according to both defendant and the Attorney General. As we have discussed, the abstract, however, incorrectly showed a total determinate term of 50 years eight months, because it failed to reflect that the three-year enhancement for count 5 was concurrent. With correction, the abstract will reflect the court's pronouncement—a total determinate term of 47 years eight months.

Thus, whatever vagaries there may be in the "unreported" note, there is no dispute that the trial court correctly pronounced, and the abstract will correctly show, a total determinate term of 47 years eight months. There is no evidence defendant's constitutional rights were violated by pronouncement of any sentence outside his presence.

DISPOSITION

The superior court is directed to correct the abstract of judgment to show that the enhancement on count 5 is concurrent with count 8 and that the total determinate sentence is 47 year eight months. It all other respects the judgment is affirmed.

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Banke, J.

We concur:

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Humes, P.J.

_____
Sanchez, J.

A156923, *People v. Blacknell*